(5)

No. 97-663

Supreme Court, U.S.
FILED
DEC 8 1997
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

NEWSWEEK, INC.,
Petitioner,

v.

DEPARTMENT OF REVENUE OF THE STATE OF FLORIDA, LAWRENCE H. FUCHS, and ROBERT F. MILLIGAN,
Respondents.

On Petition for a Writ of Certiorari to the District Court of Appeal of Florida, First District

---

REPLY BRIEF FOR PETITIONER

RAYMOND P. CARPENTER
MARK E. HOLCOMB
SUSAN L. TURNER
HOLLAND & KNIGHT LLP
315 South Calhoun Street
Tallahassee, FL 32302
(904) 224-7000

BRUCE J. ENNIS JR.*
NORY MILLER
JENNER & BLOCK
601 Thirteenth Street, N.W.
Washington, DC 20005
(202) 639-6000

* *Counsel of Record*

December 8, 1997

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

988

TABLE OF AUTHORITIES

CASES — Page

Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971) 6
Department of Revenue v. Magazine Publishers of America, Inc., 565 So. 2d 1304 (Fla. 1990), *vacated and remanded*, 499 U.S. 972 (1991), *aff'd on other grounds*, 604 So. 2d 459 (Fla. 1992) 4
Florida Home Builders Ass'n v. Department of Labor & Employment Security, 412 So. 2d 351 (Fla. 1982) 5
Hansberry v. Lee, 311 U.S. 32 (1940) 6
McKesson Corp. v. Division of Alcoholic Beverages and Tobacco Dept., 496 U.S. 18 (1990) 3
Reich v. Collins, 513 U.S. 106 (1994) 3
Warth v. Seldin, 422 U.S. 490 (1975) 5

STATUTES

Fla. Stat. § 212.07(4) 2
Fla. Stat. § 215.26(1)(b) 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-663

NEWSWEEK, INC.,

Petitioner,

v.

DEPARTMENT OF REVENUE OF THE STATE OF FLORIDA, LAWRENCE H. FUCHS, and ROBERT F. MILLIGAN,

Respondents.

On Petition for a Writ of Certiorari to the District Court of Appeal of Florida, First District

---

REPLY BRIEF FOR PETITIONER

Nothing in respondents' opposition weakens the case for this Court's review or supports the Florida District Court of Appeal's decision. Indeed, the opposition underscores the unexpected nature of the court's interpretation of Florida tax remedies and the pressing need for this Court's review. As petitioner showed in its petition for a writ of certiorari, the court below—according inappropriately cramped readings to this Court's due process decisions—denied petitioner a refund of an unconstitutional tax because it found a hitherto unknown predeprivation remedy available.

Respondents do not dispute the material contentions raised by the petition in this case. They do not deny that the predeprivation remedy found by the court below was unknown during the time the tax was due and paid. In-

deed, they emphasize that the Department of Revenue did *not* rely on the existence of any predeprivation remedy in rejecting petitioner's refund request, Op. Cert. 10; did *not* rely on the existence of any predeprivation remedy before the trial court, *id.* at 10, 12; and did *not* rely on the existence of any predeprivation remedy before the District Court of Appeal, *id.* at 14, 16. Likewise, respondents do not deny that the predeprivation procedure recognized by the court of appeal would subject taxpayers to financial sanctions. Respondents also do not deny that Florida's retund remedy *had* previously been available to all taxpayers, without regard to whether a predeprivation remedy existed. Finally, respondents do not quarrel with petitioner's statement that Florida's refund remedy, as it had always been interpreted, was mandatory and not within the unfettered discretion of state officials to grant or withhold.

Instead, respondents raise two points, neither of which is presented here, counsels against review, or justifies the decision below or Florida's unconstitutional actions.

1. Respondents argue that, as a matter of state law, petitioner was not legally entitled to pay the tax at issue but was required instead to pass it on to its customers. That state law issue was not a basis of the decision below. This is made clear not only by that court's discussion of the reasoning it did rely on, but also by the court's decision not to order the state to grant a refund. Had the court found that Newsweek was not entitled to pay the tax, it would have been required to order a refund on *that* ground, as would the Department of Revenue in the first instance. *See* Fla. Stat. § 215.26(1)(b) (refund provided for payment where no tax is due).[1]

2. Respondents' second argument is that petitioner's refund claim was barred as *res judicata*. Again, that question is not presented here because the court below did not rely on *res judicata* to reach the judgment at issue. Indeed, the court below expressly stated that its decision was premised on its conclusion that a predeprivation remedy existed. Thus, it explained: "Because we find no due process violation in the State's failing to provide a refund or other retroactive relief where Newsweek had an adequate predeprivation remedy, we affirm." Pet. App. 2a.

[1] Respondents' interpretation of state law is also incorrect, as the court below apparently concluded. Florida law prohibits sellers only from *advertising* that they will absorb a sales tax, Fla. Stat. § 212.07(4), Op. Cert. 22 n.10; it does not prohibit sellers from simply paying the tax. Newsweek did not advertise contrary to this provision, and has not been charged with doing so.

Respondents' argument to the contrary is based on enthusiastic bootstrapping from their own trial brief rather than on the opinion of the court below. Respondents optimistically interpret the trial court's summary order as a specific confirmation of each and every argument they made to that court. *See* Op. Cert. 24. Respondents do not overtly claim that the court of appeal's decision rested on *res judicata*. Rather, they simply assert, without explanation or support, that: "The denial was affirmed by the Florida district court of appeal on grounds having nothing to do with the issue here raised by Newsweek." Op. Cert. 15.

The grounds for the court of appeal's decision, however, as that court made clear, were its interpretation of Florida law to find a predeprivation remedy and its determination that due process under *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco Dept.*, 496 U.S. 18 (1990), and *Reich v. Collins*, 513 U.S. 106 (1994), required no more. Pet. App. 2a, 6a-7a. Indeed, the court of appeal carefully distinguished its decision from the lower court's by explaining that it was required to affirm "if the trial court was correct for any reason"—not just the reasons relied on by the trial court. Pet. App. 4a. The only trial court conclusion the appellate court specifically accepted was that Newsweek was not "entitled to a refund under the Due Process Clauses of the United States and Florida Constitutions." Pet. App. 5a. The court of appeal did not even mention the doctrine of *res judicata*.

3. In any event, there was no proper *res judicata* ground for that court to rely on. It is undisputed that Newsweek was not a named party to the earlier suit, *Department of Revenue v. Magazine Publishers of America, Inc.*, 565 So. 2d 1304 (Fla. 1990), *vacated and remanded*, 499 U.S. 972 (1991), *aff'd on other grounds*, 604 So. 2d 459 (Fla. 1992). Even assuming *arguendo* that Magazine Publishers of America ("MPA") was Newsweek's virtual representative, it is not clear that MPA was itself a party to that suit. Although MPA was one of the five plaintiffs that brought the suit, Florida challenged MPA's right to bring suit, claiming that MPA did not meet the test for associational standing. *See* Answer of Florida Dep't of Revenue, Civ. No. 88-2442 (2d Cir., Leon County, filed July 25, 1988) (seventh affirmative defense). That dispute was never resolved because the other four plaintiffs were magazine companies, each of which independently had standing to challenge the constitutionality of the tax.[2]

It is also undisputed that the issue in question here—whether Newsweek is lawfully due a *refund*—was not litigated in the earlier action. As respondents concede, the plaintiffs in that action sought only two remedies: a declaration that the tax was unconstitutional and an injunction restraining the state from collecting the tax. Op. Cert 3. They "*did not request or seek a refund of the tax remitted on the sale of magazines in Florida*" for any MPA member. *Id.* at 4 (emphasis in original).

Thus, the litigated issue that respondents rely on to preclude Newsweek's refund claim was whether the appropriate *prospective* remedy for the unconstitutional tax was to withdraw the newspapers' exemption from tax or to extend that exemption to magazines. As respondents admit, what retrospective remedy is appropriate under state law was *not* litigated and *not* decided in the *Magazine Publishers* case. Therefore, even if MPA was a party to that suit, and even if MPA could be characterized as representing Newsweek's interests for purposes of *res judicata*, MPA at most represented only Newsweek's interest in having the tax declared unconstitutional, not its interest in obtaining a refund or other remedy for unlawful taxes already collected.

[2] The four plaintiffs with undisputed standing in that case were The Hearst Corporation; Time, Inc.; Golf Digest/Tennis, Inc., and Meredith Corporation. Newsweek was not a named plaintiff and did not intervene. *Accord* Op. Cert. 11.

Furthermore, MPA *could not* have represented Newsweek's interest in obtaining a refund. First, MPA did not have standing to seek that relief. Associations may not assert standing on behalf of their members when the claims at issue are specific to the individual members. *See Florida Home Builders Ass'n v. Department of Labor & Employment Security*, 412 So. 2d 351, 353 (Fla. 1982) (associational standing not available when individual members' claims for monetary relief are at issue); *see also Warth v. Seldin*, 422 U.S. 490, 515-16 (1975) (associational standing available when declaratory or injunctive relief sought but each member must be a party to a suit seeking monetary relief that is not shared by all members in equal degree).

Second, MPA would have been barred by the state's administrative exhaustion requirement. Refund suits are only available to taxpayers who have been denied refunds by the Department of Revenue. There is no reason to believe that Florida law would have permitted MPA to seek refunds from the Department of Revenue for its members, and in any event MPA had not requested refunds for Newsweek or any of its members and therefore had not received denials of any refund requests.

Third, Newsweek's claim for most of the refund at issue here had not even accrued when the earlier suit was brought. MPA and its co-plaintiffs filed suit on July 3,

1988. Newsweek sued for a refund of taxes paid throughout 1988, 1989, and most of 1990.[8]

Thus, respondents' *res judicata* argument is extraordinarily indifferent to taxpayers' constitutional rights. The Department of Revenue turned down Newsweek's refund claim and urged the courts below to affirm on the ground than the claim is precluded by an earlier suit in which Newsweek was not a party, the issue was not litigated, and the issue could not have been litigated. The court of appeal understandably declined to embrace this view. Had it done so, it would have run afoul of the due process clause in a different way. *See Hansberry v. Lee*, 311 U.S. 32 (1940); *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971).

4. Nonetheless, respondents' opposition confirms two key points. First, Florida law, as interpreted by the court of appeal to provide a predeprivation remedy and to withdraw the state's refund remedy on that basis, was not only uncertain and unclear to taxpayers; it was unclear and uncertain to Florida's own Department of Revenue. Respondents' opposition confirms that even Florida's Department of Revenue did not think the state provided a predeprivation remedy to taxpayers before the decision below.

Second, the opposition confirms that Florida's Department of Revenue and its officers remain unremittingly hostile to taxpayers seeking relief from unconstitutional taxes. They still cling to the belief that taxpayers can lose their rights to refunds for unlawfully collected taxes by a decision in a case in which the taxpayers' claims were not and could not have been brought, even after that argument failed to persuade the state's own court of appeal. Further, it is clear from their continuing defense of their grounds for rejecting Newsweek's refund that they remain of the view that the due process clause does

[8] The prospective relief ordered in *Department of Revenue v. Magazine Publishers of America, Inc.* became effective December 9, 1990. Pet. App. 4a.

not generally require retrospective relief for unlawfully collected taxes.

Thus, respondents' opposition only reinforces the message from the court of appeal's decision. If those subject to taxes in Florida, and in similarly inclined states, are to enjoy the due process rights guaranteed by the United States Constitution, this Court's review is critical.

Accordingly, this case presents an excellent vehicle for addressing and resolving the due process questions presented by this petition: whether a predeprivation remedy is clear and certain if taxpayers had no notice that the remedy was available at the time the tax was due; whether a remedy comports with due process if it subjects taxpayers to any financial sanctions; whether a refund remedy that has consistently been interpreted as mandatory may be withdrawn after the tax has been paid. Because there is no dispute that the predeprivaiton remedy discovered by the court below did not exist prior to the decision in this case, because there is no dispute that the predeprivation remedy discovered by the court below would subject taxpayers to financial sanctions, and because there is no dispute that the refund remedy historically available in Florida was mandatory, the issues raised by the petition are squarely and cleanly presented.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

RAYMOND P. CARPENTER
MARK E. HOLCOMB
SUSAN L. TURNER
HOLLAND & KNIGHT LLP
315 South Calhoun Street
Tallahassee, FL 32302
(904) 224-7000

BRUCE J. ENNIS JR.*
NORY MILLER
JENNER & BLOCK
601 Thirteenth Street, N.W.
Washington, DC 20005
(202) 639-6000

December 8, 1997

* *Counsel of Record*